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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 479

RISS AND COMPANY, INC., A CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (unreported) is set forth in the transcript (R. 29–35). The report of the Interstate Commerce Commission (R. 14–19) is briefly referred to in 49 M. C. C. 810.

JURISDICTION

The judgment of the District Court was entered on November 17, 1950 (R. 35). The petition for appeal was presented and allowed on

November 20, 1950 (R. 36, 39). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted February 26, 1951.

QUESTIONS PRESENTED

Whether the District Court erred in sustaining as sound the Commission's ruling that the proceeding instituted by appellant for a certificate of public convenience and necessity under section 207 of the Interstate Commerce Act is not one "required by statute to be determined on the record after opportunity for an agency hearing and, therefore, is not a case of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that Act, and (that) the provisions of sections 5, 7 and 8 of that Act do not apply to the said proceeding" (R. 13–14.)

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal from the judgment (R. 35) of a specially constitued District Court, United States District Court for the Western District of Missouri, sustaining as valid the procedure followed and orders entered by the Com-

mission in No. MC–200 (Sub–No. 84), *Riss & Company, Inc., Extension-Explosives* (R. 13–22).

Appellant (hereinafter called Riss) is a common carrier by motor of property operating over the highways under certificates issued by the Commission which collectively cover the transportation (1) of general and specified commodities over regular and irregular routes between points in an extensive territory extending from the Atlantic Seaboard to Colorado and Texas points, and (2) of dangerous explosives to and from a number of points, principally west of Chicago and St. Louis. At the time of the proceeding here involved, Riss also held temporary authorities, granted under section 210 (a), covering, for the most part, the transportation for which it sought permanent authority by the application instituting the proceeding.

Generally described, Riss' application, filed August 22, 1947, and amended September 3, 1947, sought a certificate of public convenience and necessity under section 207 authorizing (1) the extension of its general commodity operations to certain points in Kansas, Oklahoma, and Colorado beyond its presently certified routes and points, (2) the transportation of dangerous explosives to, from, and/or between all points presently authorized by certificates to be used by Riss only for general commodities, and (3) the transportation of dangerous explosives by irregular routes between Crane, Ind., and certain points

in Virginia and New Jersey (Appendix to Commission's report, R. 21–22). By order, the Commission set Riss' application for hearing before an examiner of the Commission. Two motor carriers and all Class I railroads in western trunkline and official classification territory intervened in opposition to the application. The Commission's Bureau of Motor Carriers was represented by counsel who participated in developing facts concerning Riss' failure to observe the Commission's safety rules and regulations. Hearings were held before the examiner on three successive days in November and two in December, 1947. Upon Riss' petition, further hearing was held on May 19 and 20, 1948. On May 20, 1948, Riss objected to the hearing as being contrary to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, 15 U. S. C., secs. 1004, 1006–7, in that the examiner had not been duly appointed under section 11 of that Act. Further hearings were held over its objection.

On June 28, 1948, Riss filed a petition before the Commission requesting a hearing on its application for certificates of public convenience and necessity in accordance with the requirements of sections 5, 7 and 8 of the Administrative Procedure Act. By orders of the Commission dated July 28, and September 7, 1948 (R. 13–14), the Commission denied the petition of Riss for the reason that the "proceeding was not required by

statute to be determined on the record after opportunity for agency hearings and, therefore, is not a case of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that Act, and the provisions of sections 5, 7, and 8 of that Act do not apply to said proceedings."

Thereafter, the examiner issued a report and order recommending that Riss' application be denied and the Commission, by Division 5, entered its report and order dated August 10, 1949 (R. 20) denying the application.

On December 5, 1949, Riss filed with the Commission a petition for rehearing and reconsideration of the order of the Commission, by Division 5, and on February 27, 1950, a further petition for a hearing in accordance with the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. By order dated April 19, 1950, the Commission denied the petitions (R. 20–21).

After the Commission's first denial of its petition for a hearing under the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, Riss on September 30, 1948, filed a complaint in the United States District Court for the District of Columbia seeking a mandatory injunction requiring the Commission to conduct the hearing in accordance with the provisions of said sections of that Act. The District Court in an

Informal Memorandum of Judge Letts (not reported) denied Riss' motion for a preliminary injunction stating in part:

> 3. The proceeding in issue is not required by statute to be determined on the record after opportunity for an agency hearing and, therefore, is not a case of adjudication which is required by Section 5 of the Administrative Procedure Act to be heard and decided in conformity with Sections 7 and 8 of that Act, and the provisions of Sections 5, 7 and 8 of that act do not apply to the proceeding.

Upon appeal, the Court of Appeals for the District of Columbia reversed on the ground that Riss had failed to exhaust its administrative remedy and, therefore, its application was premature. *Riss & Co., Inc.* v. *Interstate Commerce Commission, et al.*, 179 F. 2d 810.

On May 2, 1950, Riss brought suit (R. 1) in the court below to set aside the Commission's orders of August 10, 1949 and April 19, 1950, on the grounds, substantially, that since the Commission had not conducted the hearings pursuant to sections 5, 7 and 8 of the Administrative Procedure Act, the proceedings were void, and, further, that the Commission's findings of fact and conclusions of law, on which it based its denial of Riss' application for a certificate, were arbitrary, capricious, contrary to the evidence and violative of the provisions of the Interstate Commerce Act

applicable to Riss' application (R. 4). Answers were filed by the United States (R. 25) and by the Commission (R. 25). Hearings were held before the court on September 30, 1950 (R. 36). A certified copy of the record made before the Commission was introduced (R. 41). On October 17, 1950, the court rendered and entered its opinion together with its findings of fact and conclusions of law, sustaining the Commission's orders as in all respects valid (R. 28–35). On November 17, 1950, the court entered its judgment dismissing the complaint (R. 36).

ARGUMENT

I

The provisions of Sections 5, 7 and 8 of the Administrative Procedure Act do not apply to the Commission proceeding instituted by Riss' application for a certificate of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act

It should be emphasized at the outset that Riss' grievance is not that it was denied a hearing in the Commission proceeding. Riss was, in fact, afforded a full, fair and impartial hearing consuming seven days, this being frankly admitted by his counsel near the close thereof on the seventh day.[1] Riss contends that the hearings on which the Commission's orders denying its application were based were not held in accord-

[1] Pages 924–925 of testimony before the Commission included in the record on appeal (R. 42).

ance with sections 5, 7 and 8 of the Administrative Procedure Act[2] (hereinafter called the Procedure Act), this particularly because the Commission Examiner was not appointed or qualified under that Act, and because an attorney of the Legal and Enforcement Section of the Commission's Bureau of Motor Carriers participated in the proceeding both by introducing testimony and by argument, oral and in briefs.

The hearing examiner requirements embodied in sections 7 and 11 of the Procedure Act and the separation of functions requirements of section 5 (c) as well as the provisions of section 8 are applicable only to cases of adjudication in which a hearing is "required by statute," i. e., some statute other than the Procedure Act. The introductory clause of section 5 limits application to "every case of adjudication *required by statute* to be determined on the record after opportunity for agency hearings * * *." Sections 7 and 8 by their express terms are applicable only to hearings which sections 5 and 4 require to be conducted pursuant thereto.

Thus, while section 5 provides in its paragraph (a) for notice of an agency hearing in the way there particularized, and in its paragraph (b) for certain procedure to obtain settlement of "any controversy by consent" and, failing in that, for *"hearing and decision upon notice and*

[2] 60 Stat. 237, 5 U. S. C. 1004, 1006–7.

in conformity with sections 7 and 8," all is subject to the introductory clause of section 5, limiting the application of its said paragraphs (a) and (b) and also (c), "Separation of functions," to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing x x x."

As to section 4,[3] relating to rule making, this section for the most part recognizes the usual principles that rule making (in its usual sense and meaning) may be undertaken after notice of general kind and after opportunity afforded interested persons to participate in informal procedure; and the section makes only one exception to the informal procedure by prescribing, instead, the procedure laid down in sections 7 and 8. But here, too, such procedure under sec-

[3] SEC. 5, "Adjudication" (and not section 4, "Rule Making") is pertinent to the Commission's action here in denying Riss' application for a certificate, this being shown by the definitions in paragraphs (d) and (e) of section 2, reading as follows:

(d) *Order and Adjudication.*—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission. "Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

tions 7 and 8 is made to apply only "where rules are *required by statute* to be made on the record after opportunity for an agency hearing x x x" (sec. 4 (b), Procedure Act).[4]

Coming then, to section 7, while this section provides, among other things, that "there shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners *appointed as provided in this Act*" (sec. 11), still it will be seen from the opening clause of the section that such requirement and the others that follow are made to apply only "In hearings

[4] Nevertheless, such exception whereby the procedure under sections 7 and 8 is made to apply covers a wide field. For, "rule making", as defined in sec. 2 (c), includes, among other things, the approval or prescription for the future of rates (of all sorts), reorganization of financial structures, allowances, valuations, and practices bearing upon any of the foregoing, all of which are subject to hearings under express requirements of the Interstate Commerce Act and all, when assigned to an examiner, are assigned to a hearing examiner appointed pursuant to section 11 of the Procedure Act. Attached hereto, marked Appendix B, is a copy of a Commission order (published in the Federal Register, June 1947) amending its order or rules as to the assignment of work by providing that all proceedings in which, by provisions of the Procedure Act, a hearing is required to be conducted in conformity with section 7, and a decision to be made as provided in section 8 of that Act, shall be reserved to the Commission for initial decision (as distinguished from recommended decision) and for such purpose of initial decision may be assigned to a Division, individual Commissioner, or board as provided in section 17, I. C. Act. Among other things, the order excepts from such reservation proceedings required to be submitted to joint boards by section 205 of the I. C. Act.

which sections 4 or 5 requires to be conducted pursuant to this section." And similarly as to section 8, the opening clause thereof limits application of that section's requirements to "cases in which a hearing is required to be conducted in conformity with section 7". Section 11, it will be noted, applies only to the appointment of such "examiners as may be necessary for proceedings pursuant to sections 7 and 8." Thus, none of these sections is applicable to Riss' application for a certificate of convenience and necessity under section 207 of the Interstate Commerce Act, the reason being that that statute does not require a hearing upon such an application.

In his brief (p. 17) Riss says:

> Section 5 of the Administrative Procedure Act is the keystone to the procedure specified in other sections of the Act regarding administrative adjudications. If the adjudication is within section 5 of the Act, the agency must comply with the procedure detailed in sections 5, 7 and 8.[8]

[8] The immediately succeeding sentences in the brief seem to indicate the view that section 4, relating to "rule making", provides only for informal procedures, whereas, as just above shown, the last sentence of section 4 (b) provides: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." And, as pointed out in footnote 4, *supra*, in view of the definition of "rule making", such exception in section 4, whereby the procedure under sections 7 and 8 is substituted and made to apply, covers a wide and important field of the Commission's activities.

Taken together with subsequent argument, this statement presumably means that only as the adjudication is within section 5, is the agency required to comply with the procedure detailed in the sections mentioned, including section 7's requirement that in such case a hearing examiner be one appointed pursuant to section 11. The legislative history of the Procedure Act[6] is replete with evidence that sections 5, 7, 8 and 11 of the Act were intended to apply only to cases of adjudication in which Congress had by some other statute specifically required opportunity for an administrative hearing. Thus, the Senate Judiciary Committee's Comparative Print of S. 7 and H. R. 1203, Sen. Doc. 248, contains the statement that the provisions of section 7 respecting hearings "are not designed to require hearings where Congress has not already done so by statute."

Similarly, there are statements by the then *Chairman of the American Bar Association's Committee on Administrative Law*, Sen. Doc. 248, p. 79;[7] in the *Senate Committee Report*, id.

[6] The entire legislative history of the Act is printed in Administrative Procedure Act, Legislative History, 79th Cong., 1944–46, Senate Document 248, 79th Cong., 2d Session.

[7] Mr. McFarland: "• • • But none of the measures, I think, with one exception, provides that the procedure in respect to adjudication shall apply to any case unless Congress has specifically, by some other statute, required an administrative hearing. But if the case is required by statute

p. 202;[8] in the *House Judiciary Committee Report*, id. p. 251, 260;[9] in the remarks of *Representative Walter*, sponsoring the bill on the floor of the House of Representatives, id. p. 359;[10]— all, in substance, stating that the language of section 5 limits the operation of the statute to cases in which other statutes require a hearing. See

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to be heard by an administrative agency, all of the various bills provide that the hearing shall be conducted in a certain way. First, upon notice; second, upon specified procedure."

[8] "The general limitation of this section [sec. 5] to cases in which other statutes require the agency to act upon or after a hearing is important. All cases are nevertheless subject to sections 2, 3, 6, 9, 10 and 12 so far as those are otherwise relevant.

The numbered exceptions remove from the operation of the section even adjudications otherwise required by statute to be made after hearing. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision. * * *."

[9] "This section [5] is limited to cases in which other statutes require an agency to act upon or after a hearing, but even then the numbered exceptions remove from the operation of the section adjudications otherwise required by statute to be made after hearing or opportunity therefor. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision."

[10] "Section 5 relates to the judicial function of administrative agencies where they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions."

also *Attorney General's Manual on the Administrative Procedure Act*, p. 41.

The Procedure Act derives largely from two Bills introduced in the 77th Cong., 1st Sess., S. 674 and S. 675, both of which required, *inter alia*, hearings before hearing commissioners in "proceedings wherein rights, duties or other legal relations are *required by law* to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing." During hearings held on S. 674 and other bills by a Senate Judiciary Subcommittee, it was suggested that the phase "required by law" was ambiguous and should be made more definite and certain. Thus, Interstate Commerce Commissioner Aitchison stated (Senate Hearings on S. 674 et seq., 77th Cong., 1st Session (1941) 453–454:

> For the purposes of sections 302–309, is the proceeding one in which a hearing is held pursuant to a requirement of law that the matter shall be determined only after opportunity for hearing, or is it the intent to cover cases where the law specifically holds out no such privilege of opportunity for hearing, but the agency as a matter of convenience or discretion itself ex gratia offers the opportunity?
>
> This should be made unmistakably clear * * *.

Referring to the same phase "required by law" Solicitor General Biddle suggested that the words "statute or Constitution" be substituted for the word "law". He pointed out (*ibid.*, p. 1456) that:

> In some cases certain agencies had ex gratia by regulations imposed upon themselves requirements of formal procedures though the applicable statute made no such requirement. In order to exclude the possibilities that such procedures come within Title III, the amendment is desirable.

As has been above shown, section 5 of S. 7, and of the Procedure Act as enacted, expressly limited the adjudicatory provision to "hearings required by statute"; and Riss does not dispute that the effect of this was to limit the application of sections 7 and 8 to cases where the agency statute requires hearings (Br. 17), although, based on this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, and others, he does apparently contend (Br. 18–19) that "necessary judicial construction" compels a hearing on an application for a certificate under section 207 (a) of the Interstate Commerce Act. In the *Sung case, supra*, this Court held, *inter alia*, that the difficulty with "the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation"; that it "was under compulsion of the Constitution that

this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here for some time even if illegally" (p. 49); that "the limitation to hearings 'required by statute' in section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion"; that it did not think the limiting words render the Act "inapplicable to hearings, the requirement for which has been read into a statute by the Court to save the statute from invalidity"; that "they exempt hearings of less than statutory authority, not those of more than statutory authority" (p. 50).

1. Even if the Commission, in adjudicating the application for a certificate, had accorded Riss informal procedure only, it would have denied Riss nothing required by the agency statute or compelled by the Constitution

The contentions and argument in Riss' brief, including assertions in the opening paragraph of the "Statement" (Br. 2), seem colored by his failure to note that "rule making", as defined by the Procedure Act, covers, by special mention, functions of the Commission of outstanding importance, including notably its function of prescribing future rates and rules and practices affecting rates.[11] So far as Riss' application for

[11] Pages 33–34, Attorney General's Manual on the A. P. A., 1947.

a certificate is concerned, he is correct in his statement to the effect that section 5 of the Procedure Act is the "keystone" governing whether the procedural requirements of sections 7 and 8 apply (Br. 17). But, while section 4, "Rule Making", unlike sections 5, 7 and 8, specifies in its early provisions only informal procedures, the last sentence of section 4 (b) contains an exception, making the requirements of sections 7 and 8 apply in place of such informal procedures "Where rules are required by statute to be made on the record after opportunity for an agency hearing * * *."

Not only does Part II of the Interstate Commerce Act require hearings in all manner of rate cases (including cases involving the joint rates of motor carriers with carriers of other kinds) where the Commission, if finding that the existing rates, or rules or practices affecting the rates, violate the Act's provisions against unreasonableness, unjust discrimination or undue prejudice, determines and prescribes the future rates, rules and practices (sec. 216 (e), (f) and (g)), but it also requires hearings before the Commission may enter an order in *any* proceeding involving violation of *any* provision of said part or of any requirement of the Commission thereunder (sec. 204 (c)). Also falling within the general class of provisions requiring hearings in matters involving violation of the Act's provisions or of the Commission's requirements thereunder is section

212 (a) which requires a hearing and finding of "wilful" violation before a certificate of public convenience and necessity (once issued and effective) may be suspended, changed or revoked. In no case as to which Part II (i. e., the agency statute) requires a hearing does the Commission assign an examiner other than one appointed pursuant to section 11 of the Procedure Act. But, in sharp contrast to the cases, and their subject matter, as to which Part II makes hearings a prerequisite to the entry of orders, are application cases such as that of Riss whereby the applicants seek certificates granting them the privilege of conducting the business of transporting freight over the public highways.

While Riss concedes that section 207 (a), relating to the issuance of certificates does not in terms require a hearing (Br. 7) and, while he points to no other provision of Part II that does, he contends that under decisions of this Court and the Commission's own construction the Interstate Commerce Act requires hearings on applications for certificates under section 207 (a). As to the asserted construction of the Commission, Riss relies principally (Br. 12–15) on statements contained in the Commission's 1938 recommendations to Congress for changes in the Motor Carrier Act,[12] which recommended changes included a proposed amendment (now section 210 (a)) em-

[12] 75th Cong., 1st Sess., Senate Document No. 154, Jan. 5, 1938.

powering the Commission to grant temporary authorities without hearings or other proceedings, the purpose being to enable the Commission to meet emergency situations such as result from the opening of new oil fields, from floods or other calamitous visitations or from other causes occasioning urgent need for motor carrier service. In recommending that it be empowered to grant such temporary operating authorities, the Commission emphasized that, as the Act then stood, it was necessary to obtain a certificate, or a permit, before new motor carrier operations could be undertaken; and, on this point, its recommendations contained the statements quoted in Riss' brief (p. 13), to wit:

> As the Act now stands, it is necessary, before new operations of a motor carrier can be undertaken to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The Act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there

> presented. The Act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants.

* * * * *

Following the quotation from the Commission's legislative recommendations and after mention of testimony of Commissioner Eastman before the House and Senate Committees, Riss' brief states (pp. 14–15) that "Congress, in accordance with this recommendation of the Commission, enacted in 1938 section 210 (a) of the Interstate Commerce Act * * *"; that "Congress thus confirmed the construction that the Commission is required to afford applicants for certificates of public convenience and necessity a hearing under section 207 (a)"; that the conditions, specifically limiting the issuance of temporary authority without hearings to emergency situations and for periods of limited duration, "are in sharp contrast to the standards of public convenience and necessity and the indefinite duration of certificates under section 207 (a) where hearings and formal procedures are required."

However, the Commission, in making its 1938 legislative recommendations, was faced, not only with urgent need that it be empowered to grant temporary operating authorities without hearings

or other proceedings, but also with requirements for hearings which retarded and made unnecessarily onerous its task of disposing of applications and other matters. In speaking of the necessity for public hearings, the Commission was referring to the Act's provisions as they then stood and not reading a requirement for hearings into proposed amendments which it was recommending. At page 3 of its legislative recommendations (Document No. 154, 75th Cong., 1st Sess. Senate), just following its discussion of the need for a provision enabling it to grant temporary operating authorities, the Commission took up the need for changes in section 213, Part II of the Interstate Commerce Act, which section required that its approval be obtained for transactions involving mergers, purchases, leases and acquisitions of control of motor carriers. After pointing out that the provisions of section 213 were modelled after the similar provisions of section 5 of Part I with reference to railroads and accordingly provided for like procedure including public hearings; that, while such procedure was appropriate and necessary in passing upon proposed railroad unifications, that was by no means always the case in approving like transactions involving motor carriers, the Commission said (*idem*, p. 4):

> We believe that in a considerable number of instances there is no real need for a public hearing in connection with an applica-

> tion under section 213, and that one should be required only where we deem it necessary in order to determine whether the findings which are requisite to a grant of authority may properly be made.[13]

Just following the above, the Commission made its first mention of need for change in section 205 (f) of Part II (now lettered sec. 205 (e)),[14] saying:

> Below we recommend a corresponding change in section 205 (f), but even with this change that paragraph will still require notice of all proceedings to be given interested parties and State authorities, with opportunity to make representations to the Commission. This will furnish a check on the need for a hearing.

Continuing with its discussion of this recommended change, the Commission said (idem, p. 6):

> Section 205 (f) of the act is as follows: (f) In accordance with rules prescribed by the Commission, reasonable notice shall be accorded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are, or are proposed to be,

[13] The changes in section 213 which the Commission recommended are shown at pages 14–15 of said Document 154, and were enacted into law June 29, 1938, 52 Stat. 1239–40.

[14] 54 Stat. 922.

conducted, and opportunity for hearing and for intervention in connection with any such proceedings shall be afforded to all interested parties.

In view of the amendments above recommended, which would eliminate the necessity for a public hearing in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing, we recommend that the last part of this paragraph be changed to read as follows:

* * * and opportunity for intervention in connection with any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

There is a precedent for this in section 20a (6) of part I of the Interstate Commerce Act with reference to applications of railroad companies for authority to issue securities. That paragraph requires the Commission to serve notice of applications upon governors, gives the appropriate State authorities the right "to make before the Commission such representations as they may deem just and proper"; and then provides that the Commission "may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

There is no reason to believe that the Commission will be arbitrary in omitting

hearings. Not only would this be contrary to all of the traditions of the Commission, but it would be rendered difficult by the notice and opportunity for representations which section 205 (f), as amended, would still require, as well as the full opportunity which the act affords interested parties to petition for reconsideration of a decided case and to seek hearing or rehearing in connection therewith. Arbitrary refusal to grant a hearing where one is needed would also expose the Commission to much risk of court reversal.

It will be noted that the Commission, in recommending the change in section 205 (f), precedes the same by the statement that it is making the recommendation "In view of the amendments above recommended, which would eliminate the necessity for a public hearing in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing * * *." The amendments, eliminating the necessity for hearings in certain instances, which the Commission had already recommended were the amendment empowering it to grant applications for temporary authority and the amendments in connection with applications under section 213, eliminating hearings except as the Commission deemed them necessary in order to enable it to make the requisite findings. The instances in which the Act permitted, except for paragraph

(f) of section 209, action without public hearing, were notably other application cases, such as applications for certificates under section 207 (a) or for permits under section 209. Clearly such "instances" did not include rate cases or other cases involving violation of the Act's provisions or requirements of the Commission thereunder since, in all such cases, Part II expressly requires hearings and findings of violation before the Commission may prescribe the future rates or practices or enter an order requiring compliance (see p. 17, *supra*). Furthermore, it will be noted that, as a precedent for its recommended change in section 205 (f), the Commission mentions still other application cases, namely, applications of the railroads for authority to issue securities under section 20a.

So that, the statement quoted in Riss' brief from the Commission's 1938 legislative recommendations, that as the Act now stands it is necessary before new motor carrier operations can be undertaken to obtain a certificate of public convenience and necessity, or a permit, and that necessarily considerable time is entailed in public hearings, was not a construction by the Commission that Part II, as amended in accordance with its recommendations, required hearings on applications for certificates under section 207 (a). Nor did Congress, by enacting the amendments in accordance with the Commission's recommen-

dations, confirm or adopt any such construction. Principally featured in the 1938 legislative recommendations was the fact that the administration of the Motor Carrier Act had proved to be a most onerous task, particularly because of the vast number of carriers and brokers subject to the Act (Cf. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 84; *Crescent Express Lines* v. *U. S.*, 320 U. S. 401, 404); that, not only was the work of regulation greatly expanded by the number of operators, but the fact that there was such a multitude of motor carriers meant that the average operator was a "little fellow", thousands of them being one-truck or two-truck operators having much need for instruction and for procedure made as simple and informal as possible; that often such small operators were caused hardship and loss by the delays necessitated by the hearing requirements of section 213 without any offsetting public advantage (pp. 3–4); that from the outset of the Motor Carrier Act the Commission had been swamped with business and unable to handle much of it with proper administrative dispatch; and that the present report was chiefly for the purpose of recommending and obtaining, if possible, procedural amendments enabling it to carry on its work more expeditiously and effectively.

Manifestly these were the things recognized and given effect by Congress in eliminating hear-

ings as a requirement both under sections 213[15] and 205 (e). In doing this, Congress followed the course of leaving to the Commission whether hearings were necessary to enable it to make the findings requisite to support its authorizations. There have been many cases where the Commission has deemed hearings necessary for that purpose. Equally there have been and will be many where hearings and other formal procedure may be omitted to the real advantage of all concerned.

Further supporting his premise that Part II requires a hearing on applications for certificates under section 207 (a) Riss cites *American Trucking Co.* v. *United States,* 326 U. S. 77; *United States* v. *Carolina Freight Carriers Corp.,* 315

[15] After section 213 was in substance embodied in section 5 (2) of Part I (54 Stat. 905, 906), a public hearing was required upon an application by a railroad, or railroad affiliate, to acquire a motor carrier. However, the requirement for a hearing in such cases resulted from the general provision in section 5 (2) (b) requiring "a public hearing in all cases involving" railroads, and, in 1949 (63 Stat. 5), that provision was amended by adding the words "unless the Commission finds that a public hearing is not necessary in the public interest." Whether acting under section 5 (2) or 207 (a), the Commission, in authorizing railroad subsidiaries to engage in motor carrier service, limits such authority to service auxiliary to or supplemental of the railroad's operations, and that character of service is best illustrated by the substitution of motor service for rail service in way-train operations. *Barker case,* 5 M. C. C. 9, 11. As the principle governing such coordinated rail-motor service become firmly settled, known and accepted by rail and motor carriers, it may be expected that there will be fewer protests or other reason for formal hearing.

U. S. 475, 490, and *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, in all of which hearings had been accorded and the questions were, taking the cases as a whole, whether the hearings had been fair and impartial and whether the Commission's decisions were supported by the record and impartially reached using sound criteria. Naturally once a proceeding is assigned for hearing, both sides must be afforded full opportunity to introduce evidence and testimony and the Commission must reach its decision giving consideration to all evidence before it; and in all cases it must apply the statute correctly, using sound criteria.

2. The rights of an applicant as well as those of protesting carriers in a section 207 proceeding rest on the statute, not the Constitution; and similarly, the Commission's duty in the proceeding is that placed with it by the statute

Whatever the right of an individual or company engaged in ordinary business to extend that business into wider fields without governmental interference or regulation, Riss' business is not of that sort. Even the right of an applicant for a "grandfather" certificate, who may have been engaged in transporting freight over the highways for many years prior to enactment of the Motor Carrier Act, was a right resting on that statute. Congress specified the measure of proof necessary to support such an application and conditioned the granting thereof on showing by an applicant that he had been in continuous op-

eration since June 1935 except for interruptions over which it had no control. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74. *United States* v. *Maher*, 307 U. S. 148; *Crescent Express Lines* v. *United States*, 320 U. S. 401. The cases appear to hold that the certificate itself confers no property right. It is, therefore, difficult to determine what property right, if any, is involved in an application for a certificate. Any property right involved in such an application would at most be in the nature of an expectancy rather than a vested property right. The fact that the plaintiff had temporary authority to operate in no way creates a property right. By the terms of the Motor Carrier Act it does not even create a presumption that permanent authority will be granted. Section 210 (a), Motor Carrier Act, 49 U. S. C. 310 (a).

A certificate is an authorization to perform specified motor carrier service. When the Commission grants such authority it, in substance, grants a license or a privilege. *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, 289.

In *Packard* v. *Banton*, 264 U. S. 140, a suit to enjoin the enforcement of a New York statute, requiring every person engaged in the business of carrying passengers for hire in any motor vehicle, the Supreme Court pointed to this distinction. In sustaining the statute it said:

> Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether includes the lesser power to condition and may justify a degree of regulation not admissible in the former (p. 145).

In *Viscegalia* v. *United States,* 24 F. Supp. 355, (S. D. N. Y., 1938) it was said that by the express terms of the Motor Carrier Act, the granting of an application for a certificate was a matter of discretion, and that the denial of an application for such a certificate even under the "grandfather" clause was not an invasion of a constitutional right, since carriers had no vested right to carry on business as carriers in interstate commerce without obtaining a permit or certificate as required by the Act. Such a certificate is a privilege which may be granted or withheld by the governmental body without violating the due process clause.

As regards the interests of intervening carrier competitors in a section 207 proceeding, it is clear that such interests rest wholly on the statute. *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382; *Alton R. R.* v. *United States,* 315 U. S. 15 Compare *Pennsylvania R. R.* v. *United States,* 40 F. (2d) 921. The general policy of the law in this country is to encourage competition. How-

ever, the Interstate Commerce Act recognizes that unregulated competition in the transportation field may be wasteful and in its ultimate result harmful to the public. True, in delegating to the Commission the task of passing on applications for certificates, it was essential that Congress furnish a standard for the Commission's guidance, and this it did by laying down the standard of public convenience and necessity. This standard, particularly as coupled with the transportation policy, supplies entirely adequate criteria enabling the Commission to determine the essential findings and thus to judge of the need for hearing. Moreover, although Congress eliminated any requirement for hearing, it substituted a requirement that all interested parties be afforded opportunity to make representations to the Commission. As stated in the Commission's legislative recommendations "this will furnish a check on the need for a hearing." And it is evident that Congress did not believe that the Commission would use the discretion left with it otherwise than in the public interest and without careful consideration of the interest of all concerned.

3. The Procedure Act may not be read as entitling applicants for a certificate to a trial de novo if the Commission is not required to adjudicate applications on the record after opportunity for a hearing

Riss urges in effect that, as used in the Procedure Act, the words "adjudication required by statute to be determined on the record after oppor-

tunity for an agency hearing" include all proceedings other than those in which the parties upon review are entitled to a trial *de novo*. In support of this interpretation he cites Section 10 (e) (5) and 10 (e) (6) of the Procedure Act. These subsections provide the reviewing court shall "* * *, and B hold unlawful and set aside agency action, findings, and conclusions found to be * * *; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." If the Congress had any intention of placing in these subsections the interpretation that Riss urges, its language was most inept. It is a more familiar principle of statutory construction to assume Congress meant what it said. Obviously, these subsections have neither the content or purpose Riss suggests. Section 10 (e) (5) merely codifies and restates the substantial evidence rule. Attorney General's Manual on the Administrative Procedure Act, p. 109. And, by its very terms it makes a distinction between those proceedings in which hearings are held under sections 7 and 8 of the Procedure Act and other proceedings.

As far as section 10 (e) (6), quoted *supra,* is concerned, the Attorney General's Manual on the Administrative Procedure Act states at page 109:

"As to clause (6), the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that 'The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.' When S. 7 was reported by the Senate Committee, the quoted provision was omitted."

The Attorney General's Manual then points out that notwithstanding the deliberate omission, the subsequent legislative history repeats erroneous statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Sen. Doc. 248, 79th Cong., 2d Sess., p. 39; ibid p. 279. It is to be noted that Riss also cites these two references to the legislative history. However, it is obvious from the purposeful omission of that provision that Congress did not intend to create such a rule. With regard to this the Attorney General's Manual states: "To the contrary, the language of clause (6) 'to the extent that the facts are subject to trial de novo by the reviewing court' obviously refers only to those existing situations in which judicial review has consisted of a trial de novo."

Taken at its broadest Riss' interpretation would deprive administrative findings of any weight when they are subsequently called into question in the courts. Obviously, there are a great many determinations in which hearings are not required and which are not to be tried *de novo* in the courts.

In *Schenley Distillers Corporation* v. *United States,* 50 F. Supp. 491 (Del. 1943), the plaintiff made application for certificate of temporary authority under the Motor Carrier Act. The Commission, in denying the application, arrived at its conclusions from the allegations of the application without hearings or other proceedings. But the Commission did enter an order of denial. Though no hearing was required or held, plaintiff's application and the Commission's order constituted a record. And the Court held that the order of the Commission denying the certificate of temporary authority to plaintiff was a reviewable order by the Court as constituted under the Urgent Deficiencies Act.

In these two subsections Congress merely defined the quantum of review in two situations (1) where there was a statutory hearing, and (2) where there was a trial *de novo.* It did not change the methods of review but merely codified existing law.

Moreover, there is nothing in section 5 of the Procedure Act lending itself to Riss' interpre-

tation. Thus, as earlier mentioned, in the Senate Committee Report, to accompany S. 7, it is said, speaking of section 5:

> The numbered exceptions remove from the operation of the section even adjudications otherwise required by statute to be made after hearing. The first, where the adjudication is subject to a judicial trial de novo is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision * * * (p. 202, Senate Document 248, 79th Cong., 2d Sess.).

See practically identical statement in House Judiciary Committee Report, set forth in footnote 9, *supra.*

While most reparation orders of the Commission, though given but prima facie effect, are not subject to complete trial de novo, there are many functions of other agencies so subject to judicial retrial. The Procedure Act provides that "the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute". As to *any* order of this Commission, the jurisdiction for review thereof is vested in the three-judge courts provided for by 28 U. S. C. sections 2321–2325. While prior to the *Rochester Telephone Case,* 307 U. S. 125, negative orders of the Commission were not re-

viewable, the orders of the Commission of final force and effect which are now not so reviewable are indeed very few. Riss' argument seems to rest on the view that the three-judge court jurisdiction is not adaptable for review of orders save as there is a record made after formal hearing. But, aside from the provisions authorizing the grant of temporary operating authorities, involved in the *Schenley Distillers case, supra,* there other like provisions of the Interstate Commerce Act, such as section 1 (15), empowering the Commission to issue orders without notice or hearings; yet obviously the jurisdiction of three-judge courts extends to the review of orders issued under such provisions. *Peoria Ry. Co.* v. *United States,* 263 U. S. 528. Also mention should be made of the *Crescent Express case, supra,* involving an application for "grandfather" rights, which the District Court and this Court reviewed, although the only record was that made in connection with the informal procedure accorded.

Frequently plaintiffs, suing to set aside commission orders, omit supplying the District Courts with a copy of the records made in the Commission proceedings; and, in such case, they may not urge that the Commission's findings and orders are without support of substantial evidence. *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282. Yet the Commission's

reports and orders may and, of course, are reviewed by the courts to determine (1) whether the Commission acted within its statutory authority, (2) whether its report contained adequate findings and (3) whether it applied sound criteria. Even there are Commission orders reviewed by the courts where the only issue before the Commission and the only issue decided was a purely legal question, such, for example, as whether the carrier or company concerned was a carrier subject to the Act. *Union Stock Yards Co.* v. *United States,* 308 U. S. 213; *Pipe Line Cases,* 234 U. S. 548; *Valvoline Oil Co.* v. *United States,* 308 U. S. 141; *Champlin Refining Co.* v. *United States,* 329 U. S. 29. Doubtless there are still other decisions, showing that the three-judge court jurisdiction is adaptable for review of Commission orders of all kinds, with the exceptions noted in the *Rochester Telephone case, supra.*

4. The uniformity of procedure among agencies sought by the Procedure Act did not extend to the substituting of a requirement for hearing in an agency statute in place of amending provisions purposely enacted by Congress to eliminate any such requirement

Riss urges that unless Part II is construed as requiring hearings upon applications for certificates under section 207 (a) there will result a discriminatory application of the Procedure Act because certain other agency statutes require hearings upon applications for certificates of public convenience and necessity. If Riss means that such result would discriminate in favor of

the Commission, it should be pointed out that he has given no consideration to the very many rate and other kinds of cases in which the Commission is required to hold hearings. If he means that such result would discriminate against applicants for certificates from the agencies referred to, mention should again be made of the multitude of small motor carrier operators whose individual problems, it seems likely, are quite different from those of applicants for certificates from the Federal Power Commission or Civil Aeronautics Board.

The term "licensing" as defined in the Procedure Act covers licenses of many and varying types; and certificates of public convenience and necessity, when applied to the various agencies, covers operations of very different sorts and kinds. As above pointed out (p. 12, *supra*) the legislative history of the Procedure Act is replete with statements that sections 5, 7, 8 and 11 were intended to apply only to cases of adjudication in which Congress had by some other statute specifically required opportunity for an agency hearing. In fact, while Riss' brief (p. 23) in support of its argument here, quotes from Senator McCarran, the statement quoted is at best general, whereas the following goes directly to the point (Senate Document No. 248, 79th Cong., 2d Sess., p. 307):

Mr. McCarran. There is nothing in this bill which would interfere with such procedure.

Mr. Reed. I was a little uncertain, due, of course, to my lack of understanding of the bill and my lack of opportunity to give it the study which it requires.

Mr. McCarran. I wish to make it very clear to the Senator, because I appreciate the fact that he has had long experience in practice before the Interstate Commerce Commission, that there is nothing in this bill which would take away from the Interstate Commerce Commission anything in the way of functions.

Mr. Reed. And it would not change its method and rule of doing business when the method and rule is *founded on statutory authority?*

Mr. McCarran. That is correct.

Mr. Reed. I thank the Senator.

Mr. McCarran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. We did not wish to disrupt or change anything that was *statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure." [Emphasis supplied.]

Although the definition of "licensing" would include the "approval" or "permission" which the Commission grants applicants for temporary operating authority, yet it could hardly be urged that a requirement for hearing be read into section 210a. Equally, it is believed, the Procedure Act does not intend that such requirement be read into sections 207 (a), 205 (e) or 213 (now sec. 5 (2)).

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APRIL 1951.

APPENDIX "A"—STATUTES

Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. sec. 1001, *et seq.*

Section 2 (c), 5 U. S. C. sec. 1001 (c):

> *Rule and Rule Making.*—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial stuctures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 2 (d), 5 U. S. C. sec. 1001 (d):

> *Order and Adjudication.*—"Order" means, the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Section 2 (e), 5 U. S. C. sec. 1001 (e):

> *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration,

charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Section 4, 5 U. S. C. sec. 1003:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford in-

terested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted, a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective Dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5, 5 U. S. C. sec. 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspection, tests, or

elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of all parties or their representatives.

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

(c) *Separation of Functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as au-

thorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) *Declaratory Orders.*—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7, 5 U. S. C. Section 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding Officers.*—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act

shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing Powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommended decisions in conformity with section 8 and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrel-

evant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and request filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, 5 U. S. C. Sec. 1007:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to sub-

section (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions

or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10, 5 U. S. C. Sec. 1009:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and

exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial action. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional

and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 11, 5 U. S. C. sec. 1010:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established

and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed by utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommended legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498 49 Stat. 543, 49 U. S. C. section 301, *et seq.*

Section 205 (d):

(d) So far as may be necessary for the purposes of this part, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposi-

tion, relating to any matter under investigation, as the Commission has in a matter arising under part I; and any person subpenaed or testifying in connection with any matter under investigation under this part shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under part I, unless otherwise provided in this part.

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: *Provided,* That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunc-

tion the Commission's taking of jurisdiction.

Section 207.

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Section 210 (a).

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such

temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority shall be granted thereafter.

APPENDIX "B"

TITLE 49—TRANSPORTATION AND RAILROADS

CHAPTER I—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART O—ORGANIZATION AND ASSIGNMENT OF WORK

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of May A. D. 1947.

There being under consideration the provisions of the Administrative Procedure Act, approved June 11, 1946 (60 Stat. 237), and particularly sections 2 to 9, inclusive, and sections 11 and 12 thereof; also those provisions of sections 17 and 205 of the Interstate Commerce Act (49 U. S. C. 17, 305), as amended, which require certain types of procedings to be determined on the record after opportunity for hearing.

The Commission hereby finds and determines that the general rule hereinafter set out concerning the assignment of its work is necessary and proper in order that the Commission shall be enabled to conduct its proceedings, and particularly those that are required to be determined on the record after opportunity for a hearing in such manner as will best conduce to the proper dispatch of business and to the ends of justice; and that such general rule is requisite for the

order and regulation of proceedings before the Commission, or assigned or referred to an individual Commissioner, or a board, or an examiner, as authorized by section 17 of the Interstate Commerce Act (49 U. S. C. 17), namely:

It is ordered, That

The order of the Commission as to assignment of work, entered June 8, 1942, pursuant to the provisions of section 17 of the Interstate Commerce Act (49 U. S. C. 17), as amended, codified as 49 CFR, Cum. Supp., Part O, is further amended by adding thereto, codified as paragraph § O.4a, the following additional provision namely:

§ 0.4a. *Matters reserved to the Commission for initial decision under sections 7 and 8, Administrative Procedure Act.*—All proceedings of the character in which, by provisions of the Administrative Procedure Act (60 Stat. 237), a hearing is required to be conducted in conformity with section 7, and a decision to be made as provided in section 8 of that act, shall be and are reserved to the Commission for initial decision, and for such purpose of initial decision may be assigned to a division, individual Commissioner, or board, as provided in section 17 of the Interstate Commerce Act (49 U. S. C. 17), by the general order of the Commission as to assignment of work, business, or functions. The following are excepted from the foregoing reservation: (a) proceedings required by section 205 of the Interstate Commerce Act (49 U. S. C. 305) to be submitted to joint boards; and (b) specific cases, or classes of cases, as to which the Commission may order exemption from the operation of this general rule. For the purpose of such initial

decision, the record in a proceeding so reserved shall be considered as certified to the Commission for initial decision when received by the Secretary of the Commission for filing in the docket. Such certification shall not be construed as relieving the officer from the necessity of submitting such recommended, tentative, or other type of report (consistent with the requirements of the Administrative Procedure Act) as the Commission shall previously have directed him to prepare in the proceeding. In individual proceedings involving rule making as defined in section 2 (c) of the Administrative Procedure Act, and in determining applications for initial licenses, the Commission, or the division, individual Commissioner, or board, or examiner, to which or whom a particular proceeding may have been assigned under section 17 of the Interstate Commerce Act (49 U. S. C. 17), will, as warranted by the second sentence of sec. 2 (a) of the Administrative Procedure Act (60 Stat. 237), determine (c) whether there shall be a tentative decision by the Commission, or by a division, individual Commissioner, or board, or examiner, to whom the proceeding may be referred or assigned, or (d) whether there shall be a recommended decision by designated responsible officers of the Commission; and (e) in any case the Commission, or the division, Commissioner, or Board, may find upon the record that due and timely execution of the functions of the Commission imperatively and unavoidably requires that a tentative or recommended decision be omitted in that case.

Effective date.—The foregoing amendment and general rule shall become effective June 10, 1947, upon publication thereof in the Federal Register, and shall apply to all proceedings, initiated after that date, of a character subject to the application of Sections 7, 8 and 11 of the Administrative Procedure Act (60 Stat. 237).

(24 Stat. 385, 25 Stat. 861, 40 Stat. 270, 41 Stat. 492, 493, 47 Stat. 1368, 54 Stat. 913; 49 U. S. C. 17.)

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

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